Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-357

In The

Supreme Court of the United States

October Term, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,

Appellees.

On Appeal From the Supreme Court of Pennsylvania

BRIEF FOR AMICUS CURIAE STATE OF NEW JERSEY IN SUPPORT OF APPELLEES

W. CARY EDWARDS
Attorney General of New Jersey

MICHAEL R. CLANCY
Deputy Attorney General
(Of Counsel)

MARY R. HAMILL
Deputy Attorney General
(Counsel of Record)

Division of Law
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1526

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT:

POINT I:

THE THRESHOLD ISSUE IN THE MARKER FEE ASPECT OF THIS CASE IS THE VALIDITY OF A FACIALLY DISCRIMINATORY STATE HIGHWAY USER CHARGE, NOT THE VALIDITY OF A FACIALLY NONDISCRIMINATORY FLAT CHARGE 5

POINT II:

IN DETERMINING THE VALIDITY OF A SINGLE HIGHWAY USER CHARGE, ALL STATE CHARGES IMPOSED FOR HIGHWAY USE MUST BE TAKEN INTO ACCOUNT, AND CONSEQUENTLY THE PENNSYLVANIA MARKER FEE DOES NOT VIOLATE THE COMMERCE CLAUSE. 10

POINT III:

SHOULD THE COURT REACH THE ISSUE, FLAT HIGHWAY USER CHARGERS ARE AS VALID TODAY AS THEY WERE IN 1916. 13

CONCLUSION 17

APPENDIX

N. J. Stat. Ann. § 54:39A-10 ..... 1a

75 Pa. Cons. Stat. Ann. § 102 ..... 2a

75 Pa. Cons. Stat. Ann. § 1911 ..... 2a

TABLE OF AUTHORITIES

Page

CASES

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 *U.S.* 495 (1947) 14, 15, 16

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 *U.S.* 285 (1935) 14

Armco Inc. v. Hardesty, 467 *U.S.* 638 (1984) 3, 4, 7, 8, 11, 12

Bacchus Imports, Ltd. v. Dias, 468 *U.S.* 263 (1984) 6

Capitol Greyhound Lines v. Brice, 339 *U.S.* 542 (1950) 10, 15

Commonwealth Edison Co. v. Montana, 453 *U.S.* 609 (1981) 10, 11, 15

Interstate Busses Corp. v. Blodgett, 276 *U.S.* 245 (1928) 11

Interstate Transit, Inc. v. Lindsey, 283 *U.S.* 183 (1931) 10, 11

Kane v. New Jersey, 242 *U.S.* 160 (1916) 13

Maryland v. Louisiana, 451 *U.S.* 725 (1981) 4

Massachusetts v. United States, 435 *U.S.* 444 (1978) 11, 14, 15

Private Truck Council of America, Inc., et al. v. State, et al., 510 *A.*2d 300 (N.J. Super. Ct. Law Div. 1985) 2

STATUTES

N.J. Stat.Ann. § 54:39A-10 (West 1986) 2

75 *Pa. Cons. Stat. Ann.* § 102 (Purdon) 6

75 *Pa. Cons. Stat. Ann.* § 1911(a) (Purdon) 6

TABLE OF AUTHORITIES—Continued

Page

75 *Pa. Cons. Stat. Ann.* § 1916 (Purdon 1986 pocket part) 6

75 *Pa. Cons. Stat. Ann.* § 2102(b) (Purdon 1986 pocket part) 3, 5, 12

MISCELLANEOUS

P. Hartman, *State Taxation of Interstate Commerce* (1953) 11

J. Hellerstein, *State Taxation, Corporate Income and Franchise Taxes* (1983) 7

No. 86-357

In The

Supreme Court of the United States

October Term, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,

Appellees.

On Appeal From the Supreme Court of Pennsylvania

BRIEF FOR AMICUS CURIAE STATE OF NEW JERSEY IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Amicus curiae State of New Jersey submits this brief in support of the Commonwealth of Pennsylvania on the marker fee issue only. New Jersey is interested in this matter because its system of highway user charges is generally similar to Pennsylvania's, with two important exceptions. Like Pennsylvania, New Jersey imposes vehicle registration fees, which are graduated according to truck weight, and a fuels use tax on heavy trucks based on fuel consumed in traveling the State's highways (known in New

Jersey as the motor fuels use tax and in Pennsylvania as the motor carriers road tax.) Incident to its fuels use tax, New Jersey, like Pennsylvania, imposes a $25 truck identification marker fee. New Jersey's identification marker fee was increased from $6 to $25 in 1984 and was immediately challenged by American Trucking Associations ("ATA").* Unlike the situation presented in Pennsylvania, when New Jersey increased the marker fee to $25, it did not deem the fee paid by New Jersey trucks in their registration fees. The $19 increase in the marker fee was required of all trucks subject to the fuels use tax without regard to the state of registration of the truck or the location of the owner/carrier. *N.J. Stat. Ann.* § 54:39A-10 (West 1986) (reproduced in the appendix to this brief at 1a). New Jersey believes that the requirement under Pennsylvania law of looking beyond the four corners of the statutory provision imposing the marker fee on out-of-state trucks to find an offsetting $25 charge on in-state trucks raises a threshold issue of facial discrimination which has not been addressed by the parties.

The other significant difference between Pennsylvania and New Jersey's system of highway user charges is that New Jersey does not have an additional tax on heavy trucks like the Pennsylvania axle tax. New Jersey opposes the axle tax (*see* appendix to ATA's brief on the merits) and retaliates against it. *See Private Truck Council of America, Inc., et al. v. State, et al.*, 510 A.2d 300 (N.J. Super Ct.

---

* That case, captioned *American Trucking Associations, Inc., et al. v. Kline, et al.*, is pending in the New Jersey Tax Court, Docket No. 07-14-1667-85 MVT.

Law Div. 1985), app. pending in Docket No. A-1145-85T1 (N.J. Super. Ct. App. Div.).

A broad ruling by this Court invalidating flat highway user charges could call into question facially nondiscriminatory fees such as New Jersey's marker fee and fees such as Pennsylvania's marker fee which are facially discriminatory unless viewed in conjunction with vehicle registration fees. New Jersey thus urges the Court to focus narrowly on the Pennsylvania statutes before it as distinguished from flat highway user charges that, like New Jersey's, are free of any taint of facial discrimination.

———o———

SUMMARY OF ARGUMENT

The threshold issue in the marker fee aspect of this case is not the validity of facially nondiscriminatory flat highway user charges. Rather, the issue is whether Pennsylvania Act 68 of 1980, 75 *Pa. Cons. Stat. Ann.* § 2102(b) (Purdon 1986 pocket part) ("Act 68" or "section 2102 (b)") (reproduced at J.S. App. 80a) is facially discriminatory because it increases the marker fee to $25 but specifies that Pennsylvania-registered vehicles pay the marker fee pursuant to a separate statutory provision imposing vehicle registration fees. If the Court concludes under *Armco Inc. v. Hardesty,* 467 *U.S.* 638 (1984), that Pennsylvania registration fees cannot, consistent with the Commerce Clause, be counted in order to validate the Pennsylvania marker fee, the fee falls as a facially discriminatory tax. In this event, the flat tax issue need not be addressed.

If on the other hand the Court concludes that registration fees can constitutionally be counted to validate the Pennsylvania marker fee, ATA's argument fails on its own terms. If Pennsylvania registration fees are to be counted, the entire fee, not just the $25 segment attributable to the Pennsylvania marker, must be included in the balance. Given the substantial dollar amount of the Pennsylvania registration fee, Pennsylvania-registered trucks must in general pay more per Pennsylvania mile traveled than trucks registered outside the Commonwealth.

Pennsylvania registration fees should be included in determining the constitutional validity of the marker fee because these fees, and for that matter other highway user taxes such as the Pennsylvania motor carriers road tax, are part of a package of highway user charges designed to compensate Pennsylvania for the construction and maintenance of its highway system. As a rent charged by Pennsylvania for state provided facilities, the entire package of user charges should be considered as a whole. It would be anomalous to take a single element of the rent charged and declare it discriminatory if the total charges, when viewed together, are nondiscriminatory and not excessive in amount. The theoretical underpinning of this approach is not that the various charges are compensating or complementary. Nevertheless, vehicle registration fees and other highway user charges do meet the test for compensating taxes set forth in *Armco Inc. v. Hardesty, supra,* and *Maryland v. Louisiana,* 451 *U.S.* 725 (1981).

Finally, should the Court reach the issue of the validity of facially nondiscriminatory flat highway user charges, it should adhere to its long line of cases upholding these im-

positions. The validity of a state tax should not turn on factors not inherent in the tax itself—here the number of miles traveled by a truck in the taxing state. It is too uncertain whether the alleged discrimination, based exclusively on a cost per mile comparison, will invariably occur. Moreover, a state should not be required to devise a perfect highway user charge precisely calibrated to highway use and damage. Facially nondiscriminatory but imprecise formulas, including flat user charges, do not violate the Commerce Clause if the entire system of charges is fair in effect. A flat highway user charge is all the more valid, where, as here, it can be demonstrated that the charge, when analyzed on the basis of factors equally as pertinent as miles traveled, specifically vehicle weight, *favors* out-of-state interests.

—o—

ARGUMENT

POINT I

THE THRESHOLD ISSUE IN THE MARKER FEE ASPECT OF THIS CASE IS THE VALIDITY OF A FACIALLY DISCRIMINATORY STATE HIGHWAY USER CHARGE, NOT THE VALIDITY OF A FACIALLY NONDISCRIMINATORY FLAT CHARGE.

Act 68 amended the Pennsylvania Vehicle Code by increasing from $2 to $25 the fee required to purchase a truck identification marker (Pb3).* 75 *Pa. Cons. Stat. Ann.* § 2102(b) (Purdon 1986 pocket part) (J.S. App. 80a). In

---

* The designation "Pb" refers to ATA's brief on the merits.

addition, Act 68 provided that for Pennsylvania-registered vehicles "the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee." *Ibid.* The effect of section 2102(b) is to exempt Pennsylvania trucks from the marker fee imposed pursuant to that section and to impose the marker fee on Pennsylvania trucks pursuant to a separate statute requiring the payment of an entirely different fee—vehicle registration fees. 75 *Pa. Cons. Stat. Ann.* § 1916 (Purdon 1986 pocket part) (J.S. App. 86a).* When viewed alone and not in conjunction with Pennsylvania registration fees, section 2102 (b) is thus facially discriminatory because the only fee it imposes is a fee on out-of-state trucks. *See Bacchus Imports, Ltd. v. Dias*, 468 *U.S.* 263, 268, 271 (1984). It is only by recourse to Pennsylvania registration fees that the discriminatory effect of Act 68 can be cured. Thus, the threshold issue is whether a state user charge which discriminates on its face against interstate commerce may be validated by looking to a separate state user charge falling exclusively on intrastate com-

---

* As construed by the Pennsylvania Supreme Court (J.S. App. 6a), although included in the Vehicle Code, the identification marker provisions operate "in conjunction with the Motor Carriers Road Tax Act." The motor carriers road tax is part of the Pennsylvania Fiscal Code; the identification marker is issued by the Secretary of Revenue, and, "Purchase of the identification marker decal notifies the Commonwealth that the motor carrier vehicle is subject to the Road Tax Act and triggers that Act's reporting, record keeping and tax-paying requirements" (*Ibid.*). Pennsylvania registration fees are imposed pursuant to the Pennsylvania Vehicle Code (J.S. App. 7a) and are paid to the Pennsylvania Department of Transportation. 75 *Pa. Cons. Stat. Ann.* § 1911(a); 75 *Pa. Cons. Stat. Ann.* § 102 (reproduced at App. 2a).

merce. This analysis does not question the state law conclusion of the Pennsylvania Supreme Court that as a result of Act 68 the $25 Pennsylvania marker fee was in fact paid by Pennsylvania-based vehicles in their registration fees (*see* J.S. App. 23a). The question remains whether the Pennsylvania statutory scheme, as construed by the Pennsylvania Supreme Court, is consistent with the Commerce Clause.

One well known commentator on issues of state tax law has suggested that recourse to other enactments to validate a particular state tax is unwise, and this Court appears to agree:

> Implementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens.
>
> • • •
>
> Consequently, both in principle and on practical grounds, there is much to be said for a judicial test of discrimination that, in general at least, does not take into account other taxes on other transactions, but limits itself to the transactions at issue. [J. Hellerstein, *State Taxation, Corporate Income and Franchise Taxes* ¶ 4.12[5] at 150 (1983)].

In *Armco Inc. v. Hardesty, supra,* the court concluded that West Virginia's wholesale gross receipts tax discriminated against interstate commerce because local manufacturers were exempt from the tax. Accordingly, the tax fell exclusively on out-of-state manufacturers making wholesale sales within the state. The fact that local

manufacturers paid a higher manufacturing tax based upon the sale price of the manufactured item did not save the wholesale tax. The two taxes were imposed on different transactions—wholesaling and manufacturing—and it could not be determined which portion of the manufacturing tax was attributable to wholesaling.

Under this line of reasoning, Pennsylvania registration fees cannot be counted in determining whether the marker fee is consistent with the Commerce Clause. A facially discriminatory state tax can be saved by reference to another state tax only if the two enactments are "complementary" or "compensating" as in the case of a sales and compensating use tax. The hallmark of complementary taxes is that the two enactments are imposed upon "substantially equivalent events." *Armco Inc. v. Hardesty* at 642-3. While the argument is made in the portion of its brief attacking the axle tax, ATA maintains that registration fees and a tax paid only by out-of-state trucks are not compensating taxes because they do not relate to substantially equivalent events (Pb23). According to ATA, registration fees purchase the right to operate on the highways of Pennsylvania and many other states while the axle tax purchases the right to operate only in Pennsylvania. If, as ATA maintains, Pennsylvania registration fees may not be counted in order to validate the axle tax, they cannot be counted in order to validate the marker fee.*

---

* ATA's position is untenable. ATA assumes the propriety of looking to $25 of the Pennsylvania registration fee, insists that reductions in the Pennsylvania registration fee be looked to in order to establish the discriminatory nature of the axle tax (Pb19), but maintains that the balance of the Pennsylvania registration fee cannot be counted to save the axle tax (Pb23).

In short, the threshold issue confronting the Court in the marker fee aspect of this case is not, as ATA argues, the continued validity of facially nondiscriminatory flat highway user charges, but rather whether a user charge imposed only on out-of-state trucks may be saved by reference to vehicle registration fees imposed on in-state trucks. If registration fees cannot be taken into account to validate the Pennsylvania marker fee, Act 68 discriminates on its face against interstate commerce, and there is no need for this Court to reach the flat tax issue. On the other hand, if registration fees can be taken into account to validate the Pennsylvania marker fee, logically the *entire* registration fee must be counted, not just the $25 portion attributable to the marker fee. If the entire registration fee is counted, ATA's argument founders of its own making because Pennsylvania-registered trucks, which pay the full Pennsylvania registration fee or a substantial portion of it, must generally pay more per mile in Pennsylvania that out-of-state trucks paying the $25 marker fee and in some cases a mileage based portion of their base state registration fee.*

---

* Trucks weighing more than 17,000 pounds are subject to the marker fee (Pb4; J.S. App. 6a). For these trucks Pennsylvania registration fees, as reduced by Act 234, range from $237 to $945 per vehicle (J.S. App. 87a). Pennsylvania trucks traveling in jurisdictions which, like Pennsylvania are members of the International Registration Plan ("IRP"), pay a portion of their registration fee, based on mileage, to other IRP jurisdictions (Pb5, n.3), but mileage in non IRP jurisdictions is added to Pennsylvania mileage, thereby increasing the portion of the Pennsylvania registration fee paid to Pennsylvania.

POINT II

IN DETERMINING THE VALIDITY OF A SINGLE HIGHWAY USER CHARGE, ALL STATE CHARGES IMPOSED FOR HIGHWAY USE MUST BE TAKEN INTO ACCOUNT, AND CONSEQUENTLY THE PENNSYLVANIA MARKER FEE DOES NOT VIOLATE THE COMMERCE CLAUSE.

State fees or taxes imposed for the use of state financed transportation facilities* have been analyzed somewhat differently under the Commerce Clause than general revenue taxes. *Interstate Transit, Inc. v. Lindsey,* 283 *U.S.* 183, 190 (1931); *Commonwealth Edison Co. v. Montana,* 453 *U.S.* 609, 621-2 (1981). "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services . . ." (*Commonwealth Edison Co. v. Montana,* at 622, n.12), the Court has inquired into whether the fees charged are proportionate to the services rendered. *Ibid.* While a flat fee might seemingly be suspect under this test, the Court has taken into account user fees other than the fee at issue in order to decide whether the fees are proportionate to the costs incurred or services rendered. For instance, in *Capitol Greyhound Lines v. Brice,* 339 *U.S.* 542 (1950), the Court sustained a state title tax based on the fair market value of motor vehicles used in interstate and intrastate commerce on the ground that the state also imposed a mileage tax and

---

* It is clear that the Pennsylvania marker fee is a revenue raising measure tantamount to a tax, not a regulatory fee. Revenues from the enactment far exceed associated regulatory costs (see Pb4).

that, "[T]his tax added to the title tax is what Maryland actually charges for its road privileges. Thus the total charge as among carriers does vary substantially with the mileage traveled." 339 *U.S.* at 546. *See also Massachusetts v. United States,* 435 *U.S.* 444, 468 (1978). The theoretical basis for including all highway user charges in the balance is that user fees " 'partak[e] . . . of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense.' " *Commonwealth Edison Co. v. Montana, supra,* at 622, *n.*12, quoting from P. Hartman, *State Taxation of Interstate Commerce,* 122 (1953), *and see Interstate Transit, Inc. v. Lindsey, supra* at 190. If state user charges are in the nature of "rent," it would be unreasonable to assess the constitutional validity of one segment of that rent without taking into account the other payments making up the total charge.

Again because state highway user charges are in the nature of a rent designed to compensate the state for state provided transportation facilities, the Court's compensating tax analysis (set forth in *Armco Inc. v. Hardesty, supra*) should not apply. Regardless of whether the various user charges are imposed upon "substantially equivalent events," the charges should be viewed together and sustained so long as the total burden does not discriminate against out-of-state interests and so long as the total charges do not exceed the benefits conferred. *See Interstate Busses Corp. v. Blodgett,* 276 *U.S.* 245, 251 (1928); *Massachusetts v. United States, supra,* at 468. The possibility that a test of discrimination requiring the Court to weigh the effect of state taxes other than the one at issue could "plunge the Court into the morass of weighing com-

parative tax burdens" (J. Hellerstein, *supra*, at 150) will not materialize in the context of state highway user charges. These charges may be easily weighed because they may all be reduced to cost per mile comparisons.

Alternatively, even under the Court's approach to complementary taxes, registration fees and marker fees are complementary because they are imposed on "substantially equivalent events." Registration fees and marker fees are both imposed for the privilege of using and the actual use of a state's highways. Truckers bearing the burden of registration fees and marker fees are engaged in similar businesses, *i.e.*, interstate trucking. Moreover, there is no potential doubling up of taxes of the kind condemned in *Armco*, 467 *U.S.* at 644. All states impose registration fees, and all non IRP states grant registration reciprocity to vehicles properly registered in their base state. In non IRP jurisdictions, accordingly, registration fees are paid to only one state, and there is no doubling up of those fees. In IRP jurisdictions such as Pennsylvania, the fees are apportioned among states on the basis of miles traveled. Finally, the Pennsylvania Legislature has made clear that precisely $25 of the Pennsylvania registration fee is to be considered the payment of the marker fee for Pennsylvania-registered trucks, 75 *Pa. Cons. Stat. Ann.* § 2102(b) (J.S. App. 80a). Thus, $25 of the Pennsylvania registration fee is in fact a "proxy" for the Pennsylvania marker fee. *Cf. Armco, supra*, at 643.

ATA's argument that registration fees cannot be considered to be complementary to other state highway user charges because registration fees "purchase fundamentally different rights" (Pb23) is fundamentally wrong. If state user charges are assessed to reimburse a state for state pro-

vided facilities, those facilities are what the charges purchase, not some right to travel elsewhere. On the ground where ATA has chosen to mount its attack on the Pennsylvania marker fee, namely its disparate effect on in- and out-of-state trucks on a cost per mile basis, the economic cost to a domestic truck to operate in Pennsylvania plainly includes a portion of its registration fee, while other portions of its registration fee purchase the right to travel in other IRP jurisdictions.

In short, whether or not they are viewed as compensating taxes, all state highway user charges should be taken into account in determining the validity of a particular highway charge. Accordingly, Act 68 does not violate the Commerce Clause by deeming the marker fee paid in the Pennsylvania registration fee of a domestic truck. An evaluation of all highway user charges should be made regardless whether the particular fee challenged applies only to out-of-state vehicles, as does the Pennsylvania marker fee, or is facially neutral like those in New Jersey and other states.

POINT III

SHOULD THE COURT REACH THE ISSUE, FLAT HIGHWAY USER CHARGES ARE AS VALID TODAY AS THEY WERE IN 1916.

Even when the Pennsylvania marker fee is viewed in isolation from all other highway user charges, the fee does not offend the Commerce Clause. Beginning in 1916 and as recently as 1978, the Court has sustained flat user charges against the argument that a flat tax is discriminatory because it is not tailored to actual use of a government owned facility. In *Kane v. New Jersey,* 242 *U.S.* 160

(1916), the Court upheld New Jersey's imposition of vehicle registration fees on residents and nonresidents. The fees were graduated according to horse power but without regard to mileage traveled within the State, so that a nonresident making a single short trip in New Jersey paid the same fee as a resident whose car never left the State. The Court pointed out that the fee was payable by residents and nonresidents alike and reasoned that a state had the option of obtaining compensation for the use of its highways by way of an annual fee, a toll based on mileage, or otherwise. 242 *U.S.* at 168. In 1978, in *Massachusetts v. United States, supra,* the Court sustained an annual flat aircraft registration tax imposed by the Federal Government, rejecting Massachusetts' argument that the tax could not be a user fee because it was not calibrated directly to use of the airways. The tax was a fair approximation of benefits received when viewed together with other charges imposed under the Federal Act. These other charges included a fuel tax, tire tax and tube tax. 435 *U.S.* at 467-8. In 1935 and again in 1947, the Court sustained $25 flat highway user charges. *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 *U.S.* 285 (1935); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 *U.S.* 495 (1947).

The Court's holdings over the years have been based generally on one of two theories. First, the out-of-state user is not wronged by his failure to use a state provided facility to the full extent allowed. *Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra,* at 289; *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra* at 506, *n.*19. Second, when considered in conjunction with other user charges, a flat fee is fair com-

pensation for the use of a particular government owned facility. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra; Capitol Greyhound Lines v. Brice, supra,* at 546; *Massachusetts v. United States, supra,* at 467-8. In the second line of cases, the Court has pointed out that the states are not required to adopt perfect formulas reflecting "every factor affecting appropriate compensation for road use." *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra,* at 506, *n.*19; *Capitol Greyhound Lines v. Brice, supra,* at 546.

Both theories supporting flat user taxes are as valid today as when first announced. The validity of facially nondiscriminatory flat fees should not depend on a factor over which the states have no control, *i.e.* the number of miles driven in-state by a particular out-of-state truck. The number of miles driven in-state is an "adventitious consideration" of the kind found insufficient to invalidate Montana's coal severance tax, which allegedly bore more heavily on out-of-state consumers who received 90% of Montana's coal production. *Commonwealth Edison Co. v. Montana, supra,* at 618.

Nor should the states be required to precisely tailor every highway user charge to actual road use. Approximation must suffice, particularly if a state's combined highway user charges are calibrated generally to road usage and potential road damage and are not excessive in relation to the cost of services provided. *Capitol Greyhound Lines v. Brice, supra,* at 546; *Massachusetts v. United States, supra,* at 467-8. Under the Pennsylvania highway user charge system, highway usage is taken into account by way of the Pennsylvania motor carriers road tax, which is based upon fuel consumed in traveling the Commonwealth's highways

and thus on road usage (J.S. App. 6a). Vehicle weight is taken into account by means of vehicle registration fees, which are graduated according to the vehicle's gross weight (J.S. App. 86a to 87a). When viewed in combination, registration fees, fuels use taxes, and marker fees are a fair approximation of highway use and damage. Moreover, there appears to be no evidence that total Pennsylvania user charges are excessive in relation to the cost of highway services provided by the Commonwealth.

Indeed, when viewed in isolation as ATA would like, the Pennsylvania marker fee discriminates *in favor* of out-of-state trucks. The fee does not increase above $25 once a truck becomes subject to the fee by having a gross weight of more than 17,000 pounds (J.S. 3; J.S. App. 6a; J.S. App. 87a). It is an accepted fact that heavier trucks do more damage to the highways than lighter weight vehicles. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra,* at 503 and 506. In the case before the Court, ATA maintains that virtually the entire cost of the axle tax is borne by out-of-state trucks (Pb15) and points out that, "[M]ost of the trucks subject to the [axle] tax have five axles" and thus pay an axle tax of $180 per truck (Pb32). The table at J.S. App. 40a reflecting the reduction in Pennsylvania registration fees upon enactment of the axle tax shows that five-axle trucks paying $180 per truck are those in the heaviest weight classes. Is is thus apparent that out-of-state trucks as a class are among those which do the most damage to Pennsylvania's highdays. The same conclusion can be drawn from ATA's statement at Pb44 that, "The average length of haul [for an individual truck] has risen to 645 miles and is even longer for heavier trucks." Since highway damage in-

creases with truck weight and since out-of-state trucks tend to be in the heaviest weight classes, it must be concluded that a flat fee, which does not increase with truck weight, favors out-of-state trucks as a class. ATA's cost per mile argument ignores this aspect of the Pennsylvania marker fee and is thus fatally flawed. Accordingly, the Court should reject ATA's cost per mile analysis and should follow its earlier precedents sustaining flat highway user charges.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Pennsylvania upholding the marker fee should be affirmed.

Respectfully submitted,

W. Cary Edwards
Attorney General of New Jersey

Michael R. Clancy
Deputy Attorney General
(Of Counsel)

Mary R. Hamill
Deputy Attorney General
(Counsel of Record)

Division of Law
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1526

Dated March 5, 1987

APPENDIX

N.J. Stat. Ann. § 54:39A-10. Identification cards and markers; trip permits

The director shall issue to every user a motor fuel user identification card, which shall be safely preserved in the user's offices for as long as the card is valid. The user shall place a photographic copy of said card in the cab of each motor vehicle used in his operations. The director shall also issue for each vehicle operated by the user an identification marker, which shall be affixed to the vehicle in such manner as shall be prescribed by the director. The fee for each original such marker and any replacement marker shall be $25.00. Every identification card and marker shall remain the property of the State and may be recalled for any violation of this act or of the regulations promulgated hereunder, or for failure to pay any monies due the State under this act or any other law administered by the director. Identification cards and markers shall be issued on an annual basis as of April 1 of the year and shall be valid through the next succeeding March 31. The form and content of the card and marker shall be as prescribed by the director. Any card and marker issued pursuant to this act may be deemed by the director as satisfying the equivalent requirements of any other law administered by him, and any marker and card issued by him pursuant to any other law, regulation, reciprocity agreement or arrangement, or declaration may be deemed as satisfying the equivalent requirements of this act. It shall be illegal to operate or cause to be operated in this State any motor vehicle, unless the vehicle bears the identification marker and carries the copy of the identification card

required by this section; provided, however, that upon the request of a user the director may issue by mail or telecommunication a permit valid for the operation of a vehicle for a period not exceeding 25 days, pending the application for and issuance of an identification card or marker, or both. The fee for such permit shall be $8.00, which may be credited against the identification marker fee applicable to the same vehicle. A user whose vehicles in the aggregate make not more than six trips into or through this State in a 12-month period may be issued single trip permits valid for 96 hours for each round trip so made. The fee for such trip permit shall be $10.00, which shall be in lieu of reports, fees and taxes which may otherwise be applicable to said trip under this act.

L.1963, c. 44, § 10. Amended by L.1964, c. 84, § 1; L.1964, c. 258, § 3; L.1965, c. 200, § 1, eff. Dec. 17, 1965; L.1973, c. 117, § 10, eff. July 1, 1972; L.1979, c. 4, § 1, eff. Jan. 16, 1979; L.1984, c. 73, § 34, eff. July 10, 1984; L.1985, c. 7, § 3, eff. Jan. 16, 1985.

75 Pa. Cons. Stat. Ann.

§ 102. Definitions

"Department." The Department of Transportation of the Commonwealth.

§ 1911. Annual registration fees

(a) General rule.—An annual fee for the registration of vehicles as provided in Chapter 13 (relating to the registration of vehicles)[1] shall be charged by the department as provided in this title.

---

[1]Section 1301 et seq.